IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.339 OF 2004

Dr. Sanjay Sharma, 10/B, Retreat-II, Sharda Road, Saraswat Colony, Santacruz (W), Mumbai-400 054. ..PETITIONER

Versus

1. Tata Memorial Hospital, Dr. Ernest Borges Road, Parel, Mumbai,400 012.
2.Director, Tata Memorial Hospital, Dr. Ernest Horges Parel, Mumbai-400 012. ..RESPONDENTS

Mr. J.P. Cama, Senior Advocate with Mr. K.P. Anilkumar for the Petitioner

Mr. S.K. Talsania, Senior Advocate i/b. M/s. Mulla & Mulla & Craigie Blunt & Caroe for Respondents.

CORAM : F.I. REBELLO & DR. D.Y.CHANDRACHUD, JJ.

DATED : 21ST NOVEMBER, 2005.

JUDGMENT (PER F.I. REBELLO, J.)

. The petitioner joined the services of Respondent No.1 from 29th November, 1985 as Assistant Surgeon and was appointed as Professor of Surgery in 1998 and continued to hold that post. At the time of employment the petitioner had completed 31 years of age. By application dated 15th February, 2003 the petitioner sought to voluntarily retire from the services of the respondent No.1 and accordingly tendered his application for V.R.S.

under the applicable Rules effective from 1st September, 2003. By communication dated June 17, 2003, pursuant to Petitioner's letter dated 30th April, 2003, wherein the petitioner had clarified that he has sought to retire voluntarily on and from 1st September, 2003 under Rule 56(k) of the Central Civil Service (CCS) Rules, the petitioner was informed that the request of premature retirement under FR 56(k) cannot be accepted in view of the serious allegations levelled against the petitioner and as also the case was under investigation by Central Bureau of Investigation. It is this communication which is the subject matter of the present challenge.

2. The reliefs prayed for by the petitioner may now be set out as under:-

(a) that this Hon'ble Court be pleased to declare that the petitioner stood voluntarily retired on 1.9.2003 pursuant to his application dated 15.4.2003.

(b) that this Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ order or direction under Article 226 of the Constitution of India, directing the

respondents to release the petitioner's retiral dues.

3. It is the case of the petitioner that there occurred a vacancy of Head of Department of Surgery in the year 2002. As the petitioner was holding the post of Professor of Surgery in the hospital from 1998 onwards in the normal course and as per the guidelines of the Medical Council of India, the petitioner expected as the Senior most professor to be made the Head of the Department as it is a teaching institution. The respondents, however, malafidely chose to advertise the post. The petitioner responded to the advertisement and as per the averments he was the only eligible candidate. Inspite of that, to his shock the petitioner was not selected and the junior Doctor who was not even Professor was offered the post. The petitioner, therefore, filed a Writ Petition before this Court being Writ Petition No.2243 of 2002. The respondents were served and opposed the admission of that petition. The petition came to be admitted on 29th November, 2002 and is pending. The petitioner has further averred that after the admission of the petition the attitude of the respondents which was earlier also vindictive became more vindictive and the petitioner was issued various false and frivolous memos. In respect of the allegations by

communication of 14th March, 2003 the petitioner was forwarded the letter by the head of the Department to meet him personally. The petitioner remained present and at the meeting at which two other doctors were also present denied the allegations. The petitioner was disturbed by these allegations and could not concentrate on his work and under these circumstances thought it proper to take voluntary retirement from the hospital. It is the case of the petitioner that he was entitled for voluntary retirement under the provisions of Rule 56(k) of the Fundamental Rules and Supplementary Rules (FRSR) as applicable to the applicant hospital on reaching the age of 50 years. The petitioner has averred that he was due to reach the age of 50 years on 20th August, 2003. As set out earlier that application came to be rejected. In the meantime it appears that the Memorandum was issued to the petitioner and a charge sheet was served on 7th July, 2003, to which a reply has been filed on 1st August, 2003. It is the petitioner's contention that considering FR 56(k) having met the requirements of the Rules petitioner was entitled to voluntarily retire and the respondents could not have rejected the application for voluntary retirement.

4. On behalf of the respondents I,.T. Anbumani,

Chief Administrative Officer has filed an affidavit. It is contended that the petitioner not being a Government servant cannot claim any right under FR 56(k). The respondents, are an autonomous institution under the administrative control of the Department of Atomic Energy, Government of India and managed by the Governing Council appointed by the Government of India with the Chairman, Atomic Energy Commission as the Chairman of the Governing Council. The employees of the respondents are governed by the Rules and regulations specified by the Governing Council which are contained in the Bye-laws and staff service Rules of the respondents. The petitioner, it is set out, is, therefore, governed by the Bye-laws and staff service rules. The petitioner at the time of appointment was issued letter of appointment dated 26th November, 1985 and the petitioner accepted the conditions as set out therein that he would abide by the Rules and Regulations of the respondent hospital/centre as may be promulgated from time to time. It is contended that the Respondents received a complaint dated 21st Marc, 2003 from one Vijay Kumar Gupta, relative of a patient Mr. Rajendra Kumar Gupta, Dehra Dun, alleging an attempted malpractice on the part of the petitioner in February, 2003. For the purpose of deciding this controversy it is not necessary to go indepth into that complaint. According to the

respondents the complainant had also filed a complaint with the Central Bureau of Investigation and C.B.I. subsequently filed F.I.R. on 25th February, 2003 and the matter is under investigation of CBI. It has been pointed out on behalf of the petitioner at the hearing that the case has been closed by C.B.I. Disciplinary proceedings however, have been initiated against the petitioner and a show cause notice has been issued.

. It is then set out that on April 17,2003 the petitioner gave a letter seeking voluntary retirement. The petitioner was not entitled to retire as he has not completed 20 years of qualified service. On further clarification the petitioner had pointed out that his letter was to invoke the provisions of FR 56(k) and as such the matter was referred to the Government of India, Department of Atomic Energy as investigations were underway by the Central Bureau of Investigation and as the Respondents wanted direction by the Administrative Ministry. The Department of Atomic Energy after careful consideration has rejected the petitioner's application for voluntary retirement. It is set out that it is a settled position in law and in service jurisprudence that except in case of normal superannuation wherever any disciplinary proceedings are contemplated against an employee, accepting

requests for resignation or voluntary retirement is not automatic, but depends upon the circumstances of the case and in such cases no employee can claim as a matter of right that he should be relieved. The petitioner was informed on 17th June, 2003 the rejection of his request and inspite of clear direction given to the petitioner that his request for retirement has been rejected, the petitioner took law into his own hands and unauthorisedly remained absent from 1st September, 2003 and reportedly engaged himself elsewhere.

. The office order No.351 dated March, 14, 2000 has been annexed. The relevant portion of which reads as under:-

> "The Governing Council of Tata Memorial Centre has approved at its 79th meeting held on November 16, 1999 the scheme for review of cases of TMC employees (other than labour staff) at the age of 50/55 years depending on whether they have joined the service before or after 35 years of their age, for premature retirement, as in Central Govt. under Fundamental Rule 56.
>
> As regards Labour staff, their retirement will be governed by Regulation No.205 of

Mumbai Municipal Corporation (Service) Regulations, 1989.

This Scheme will be implemented w.e.f.15.4.2000."

An additional affidavit was filed on 22nd August, 2005 setting out that as the petitioner's reply to the charge sheet was not satisfactory, the petitioner was informed that the enquiry will be conducted. The enquiry has been conducted and the Respondents are awaiting the report of the enquiry officer.

5. At the hearing of this petition on behalf of the petitioner his learned Counsel has submitted as under:-

(1) Whether it is not a settled principle of law that on completion of period of notice, an officer who is eligible is automatically retired under rule 56 (k) unless the officer has not completed 50 years of age and has not joined service before the age of 35?

(2) Whether the reason given by the respondents for not accepting the voluntary retirement of the petitioner, namely, the

> pendency of the serious allegation against the petitioner can be a ground for rejecting the voluntary retirement application under Rule 56(k).

6. The first question, therefore, that has to be considered is whether F.R.56(k) is applicable. F.R. 56(k) (1) reads as under:-

> Any Government servant may, by giving notice of not less than three months in writing to the appropriate authority, retire from service after he has attained the age of fifty years, if he is in Group "A" or Group "B" service or post, (and had entered Government service before attaining the age of thirty-five years), and in all other cases after he has attained the age of fifty-five years."

A bare perusal, therefore, of the said Rule would make it clear that the Government Servant by giving notice of not less than 3 months in writing to the appropriate authority can retire from the service after attaining the age of fifty years, if he is Group A or Group B service or post (and had entered Government service before attaining the age of thirty-five years) and in all other cases after he

has attained the age of fifty-five years. The only exception carved out is that it shall be open to the appropriate Government to withhold permission to a Government servant under suspension, who seeks to retire under that clause. Admittedly the petitioner was not under suspension. The contention of the respondents in the reply, however, has been that F.R. 56(k) is not applicable as they are governed by the Staff Service Rules. The Staff Service Rules pertaining to termination by way of retirement may be reproduced:-

> "Subject to the contract under Bye-law 5.4.1 the agreement of service of any member of the scientific/medical staff shall be terminated by either party or giving a notice in writing to the other party of not less than three months, except during the period of probation when the period of notice shall be as specified in the letter of appointment. The service of any other member of the staff shall be terminated by either party giving to the other party a notice in writing of not less than that specified in the letter of appointment. Such period of notice shall not be less than 30 days except during the period of probation.

> Notwithstanding anything contained above, the service of any employee can be terminated by giving a shorter notice than that specified in paragraphs 1 or 2 on payment to him of a sum equivalent to the amount of his pay plus allowances for the period by which such notice falls short of the period specified".

Similarly Retirement is provided under Rule 20.1 and 20.2. Rule 20.2 reads as under:-

> "20.2 Staff may be permitted to retire with benefits as envisaged under the rules of Centre."

8. We need not go into the validity of Rule.e 17.3.3 to the extent power has been conferred on the employer to terminate the services of permanent employee. The matter would otherwise be covered by the judgment in **Central Inland Water Transport Corporation Ltd. & Anr. vs.Brojo Nath Ganguly & Anr. (1986) 3 SCC 156**.

. In so far as the retirement is concerned, the only provision is on reaching the age of 60 years or under any Rules of the Centre. No other Rules have been brought to our notice which permits retirement on reaching the age of 50 years. The CCS Rules or

for that matter FR/SR would not be applicable unless they have been adopted by any resolution of the Governing Council of the Board of Respondent No.1 or incorporated into rules made by the Competent Authority. Learned Counsel has, however, placed strong reliance on the O.M. dated March, 14, 2000. This O.M. refers to the power in the Governing Council to prematurely retire an employee. This relates to F.R. 56(j). FR 56(j) is a power conferred on the appropriate authority if it is of the opinion that it is in the public interest so to do, to retire any Government servant by giving him notice as set out therein. The O.M. dated March 14, 2000 came into effect from 15th April, 2000. In other words what becomes clear is that until 15th April, 2000 the power to retire an employee prematurely as set out in the O.M. was not conferred on the Governing Council of Respondent No.1 and this power is exercisable only pursuant to the resolution passed by the board and made effective from 15th April, 2000. From the said O.M. it also becomes clear that FR 56(j) has been made applicable only to employees other than labour staff. In so far as Labour staff, the Rules for premature retirement are governed by Regulation No.205 of Mumbai Municipal Corporation (Service Regulations) 1989.This by itself would indicate that F.R. 56 as it stands has not been adopted by the

Respondents. Earlier reference was made to the letter of appointment which also set out that conditions of service other than those set out in the appointment order would be governed by the Rules and the orders of Respondent No.1 in force from time to time. In the absence of any other material it will, therefore, be clear, that what the respondent No.1 has adopted and made applicable is only a part of F.R.56 namely F.R. 56(j) to the staff sector of the employees and not the entire Rule. It is a well accepted concept in service jurisprudence that conditions of service will be regulated by the letters of appointment and the Rules, Regulations and/or Standing Orders and/or Bye-laws governing the parties. In the instant case there is no Rule, Regulation or Bye-laws or Standing Order provided for voluntary retirement. Atleast none has been brought to our notice apart from FR 56(j), which permits as a condition of service an employee of Respondent No.1 to seek voluntary retirement. Merely because Respondent No.1 is under the Administrative control of the Union of India and/or is founded will not result in Rules applicable to Government employees becoming applicable to staff or employees of Respondent No.1, unless they are adopted or incorporated by a resolution or rules. In the absence of FR 56(k) being attracted the contention as urged on behalf of the petitioner that

as the petitioner was not under suspension and he has met the other predicates of FR 56(k) he stood automatically relieved and retired from service, must be rejected.

9. We may now deal with the alternative submission assuming that F.R. 56(k) was attracted. On behalf of the petitioner his learned Counsel has drawn our attention to the judgment of the Apex Court in the case of **Dinesh Chandra Sangma vs. State of Assam & Ors. AIR 1978 SC 17**. In that case a member of the subordinate judicial service in the State of Assam considering the Rules in force had submitted his application for voluntary retirement. That was accepted by the Government as also by the High Court. The petitioner was to be relieved by the afternoon of 2nd August, 1976. The petitioner was allowed to go on one month’s leave prior to retirement by the High Court with effect from 2nd July, 1976 on which date he relinquished his charge of office. It appears that there was a rethinking on the part of the Government and by order dated 28th July, 1976 countermanded its earlier order of July 1, 1976, while allowing the Judge to retire from service with effect from 2nd August, 1976. Based on that the High Court transferred the appellant from one place to another and asked him to join immediately after the expiry of leave. It was

this issue which was before the Apex Court. After considering the Rules in force and the various contentions, the Apex Court was pleased to hold that since FR 56 is statutory conditions of service which operates in law without reference to the contract of employment, the petitioner therein as he has fulfilled the conditions of FR 56 must be deemed to have lawfully retired. This judgment, therefore, would be of no assistance. As pointed out earlier we have recorded a finding on material as placed before us that FR 56(k) is not attracted. Next reliance was placed on the judgment in the case of **B.J. Shelat vs. State of Gujarat and others, AIR 1978 SC 1109.** In that case what was under consideration was Rule 161 of the Bombay Civil Services Rules. We are concerned with that part of the Rules permitting a Government servant to retire after giving notice on reaching age of 55 years. The Apex Court held that the Rule confers a right on the Government servant to retire by giving not less than 3 months notice on his attaining the prescribed age. It is only subject to the proviso under which the appointing authority could withhold permission to retire if the Government servant was under suspension or against whom departmental proceedings are pending or contemplated. In other words the retirement will be subject to the Rules. A right has been conferred on the Government servant which

right was subject to the power of the employer to withhold only in the case of suspension or departmental proceedings. This judgment would have been of assistance to the petitioner.

. Next reliance was placed on the judgment in the case of **Bhagirathi Jena vs. Board of Directors, O.S.F.C. & Ors., (1999) 3 SCC 666.** In that case even though the disciplinary proceedings were pending and charge sheet served, the petitioner retired on 30th June, 1995 and was relieved on 1st July, 1995 even though the enquiry was not completed. The issue was whether the respondents could have withheld the terminal benefits. Answering the issue the Apex Court observed that there was no regulation making a specific provision for deducting any amount from the provident fund consequent to any misconduct determined in the departmental enquiry nor was any provision made for continuance of the departmental enquiry after superannuation and in that context directed the employer to pay all the dues of the employee as if there were no disciplinary action.

. On behalf of the Respondents their learned Counsel placed reliance firstly in the judgment in **J.K. Cotton Spinning and Weaving Mill s Company Ltd. vs. State of U.P. & Ors. (1990) 4 SCC 27.**

In that case there were Standing Orders namely Standing Order 21, which permitted a permanent clerk desirous of leaving the company's service to do so by giving one month's notice in writing unless he had a specific agreement providing for a longer or shorter notice to retire from the service. The issue was whether an employee retiring under the provisions was required to comply with certain provisions of the U.P. Industrial Disputes Act, 1947 and whether such termination amounted to retirement. It is in that context that the Court held that such termination would not fall within the first part of the definition of retrenchment in Section 2(s) of the State Act. While so holding there are some observations, which were pointed out to us and which we may reproduce:-

> "Under the common law the resignation is not complete until it is accepted by the proper authority and before such acceptance an employee can change his mind and withdraw the resignation but once the resignation is accepted the contract comes to an end and the relationship of master and servant stands snapped. Merely because the employer is expected to accept the employee's resignation it cannot be said that the employer has brought about an end to the contract of

employment so as to bring the case within the first part of the definition of retrenchment. A contract of service can be determined by either party to the contract."

The above observations would be of no assistance in answering the issue as they have been considered in the context of 'retrenchment' under the State Act and secondly as the petitioner herein was basing his right on a statutory provision, namely FR 56(k).

. Reliance was next placed on the judgment in the case of **Dr. Baljit Singh vs. State of Haryana, (1997) 1 SCC 754.** In that case what was under consideration was Punjab Civil Services Rules 5.32(B). The Rule has not been quoted. On the facts of that case the Apex Court held that against the employee a trial was pending in respect of serious offence and in these circumstances it is open to the appropriate Government to decide whether or not the delinquent should be permitted to retire voluntarily. The observations apparently have been made in the context of that Rule considering the view taken by the Apex Court in Dinesh Chandra Sangma (supra) as also B.J.Shelat (supra).

9. On consideration of the case law, what emerged is that it is the conditions of service

including Regulations, Rules and Bye-laws which would determine the exercise of right of voluntary retirement. In the instant case we are not dealing with the case of resignation simplicitor. We are dealing with the case where the petitioner seeks to voluntarily retire on an assumption that FR 56(k) is in force and as the petitioner was not under suspension at the time of submitting his letter the refusal by the employer for voluntary retirement is arbitrary or illegal.. Considering the judgments earlier cited, the settled principle is that if there is a right conferred on an employee to voluntarily retire under the Rules and if the employee meets with the requirements of the Rules unless there is a power in the employer to withhold the retirement, the employee will be deemed to have retired on the period of notice coming to an end in terms of the Rules. In the instant case the petitioner sought to voluntarily retire. The respondents have rejected that application for voluntary retirement. In the absence of any Rule it was not open to the petitioner to apply for voluntary retirement and consequently whatever reasons that may have been given by the employer for rejecting his application are of no consequences. The relief as sought for in the petition is based on the right that the petitioner is entitled to voluntarily retire. There is no such right and

consequently the petition must fail.

10. While parting with the judgment, we make it clear that we have only decided the issue of voluntary retirement and not whether the petitioner has a right to resign and the consequences of a letter of resignation simplicitor.

11. Rule accordingly discharged. There shall be no order as to costs in the circumstances of the case.

(F.I. REBELLO, J.)

(DR. D.Y. CHANDRACHUD, J.)